Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A.D. 1975.

In the

Supreme Court of the United States

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

October Term, 1975

No. 75-111

BUILDERS ASSOCIATION OF SANTA CLARA-SANTA CRUZ COUNTIES, a California corporation, individually and for the benefit of its members,

Appellant,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA,

Appellee,

CITY OF SAN JOSE, a Chartered City, CITY COUNCIL OF SAN JOSE, NORMAN Y. MINETA, JOSEPH A. COLLA, JANET GRAY HAYES, ROY B. NAYLOR, ALFREDO GARZA, JR., SUSAN WILSON and JAMES SELF, as members of the CITY COUNCIL OF SAN JOSE,

Real Parties in Interest.

On Appeal from the Supreme Court of the State of California

MOTION TO DISMISS APPEAL OR AFFIRM

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SPARTAN PRINTING CO., INC., SAN JOSE, CALIFORNIA

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Real Parties in Interest move to dismiss this appeal, on the ground that it raises no substantial constitutional issues.

OPINIONS BELOW

The opinions below are fully set forth in appellant's Jurisdictional Statement. It should be noted, however,

that although the decisions of the California Supreme Court were decided 4 to 3, the dissenting opinions were directed only to the issue as to whether zoning by the initiative process violates procedural due process.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Jurisdictional Statement.

QUESTIONS PRESENTED

1. Does appellant, a trade association of various parties involved in residential construction, have standing to contend that the subject ordinance violates the constitutional right of travel of third parties?

2. Assuming appellant has standing, does an ordinance which has the practical effect, during a two-year study period, of requiring parties seeking residential zoning to contribute to the cost of building school facilities for the children in the housing they propose to build, violate the constitutional right to travel of unknown third parties who may have to pay slightly increased prices for housing as a result of the statute?

3. Does the Equal Protection Clause of the Fourteenth Amendment prohibit a municipality from applying the ordinance described in the preceding paragraph only to land which has not yet been zoned for residential uses, and not to land which has already been so zoned?

4. Is general zoning legislation adopted by initiative invalid under the Due Process Clause of the Fourteenth Amendment for failure to give adequate notice or hearing to affected property owners?

STATUTES INVOLVED

Ordinance No. 16764 of the City of San Jose, California, is fully set forth in the Jurisdictional Statement.

STATEMENT OF THE CASE

In 1972 and early 1973, the City of San Jose was faced with a severe problem of overcrowded schools. Feeling that the City Council had failed to take sufficient action on the problem, the citizens of San Jose passed an initiative ordinance which (a) temporarily required owners seeking residential zoning to contribute to the cost of schools generated by their zoning, and (b) permanently required a greater than majority (five-sevenths) vote of the City Council to override a protest by a school district that a proposed zoning would cause further overcrowding. The ordinance was directed at the legitimate municipal purpose of relieving overcrowded schools, and the method chosen was rationally related to said purpose. The ordinance was a general legislative enactment, and for that reason did not require that notice and hearing be given to every affected property owner. Accordingly, the case does not present any substantial constitutional issues.

ARGUMENT

I

APPELLANT LACKS STANDING TO ARGUE THAT THE SUBJECT ORDINANCE INFRINGES ANYONE'S RIGHT TO TRAVEL.

Appellant is a trade association of various parties involved in residential construction. Jurisdictional Statement (hereinafter JS) 2-3. As such, its right to travel claim is not asserted on behalf of itself or its members, but on behalf of a group of unknown third parties allegedly excluded from living in San Jose. Accordingly, its claim on this issue "falls squarely within the prudential standing rule that normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves." *Warth v. Seldin*, ... U.S. ....., ...; 43 U.S.L.W. 4906, 4911 (1975). Nor does this case fall within any of the exceptions to the foregoing general rule. See *Construction Industry Association of Sonoma County v. City of Petaluma*, No. 74-2100 (9th Cir., Aug. 13, 1975, slip. op. at 8-9).

Appellant attempts to distinguish *Warth* on the grounds that (1) the plaintiffs in that case sought damages, whereas appellant seeks only injunctive relief; and (2) the holding in *Warth* is confined to cases originating in federal courts and should therefore not apply to appeals from state decisions. In fact, however, *Warth* does not support either distinction, but instead rests on the "well-recognized general rule" that a plaintiff must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. *City of Petaluma, supra*, at p. 7. (JS 10). It is also well settled that a state court's recognition of standing does not bind the United States Supreme Court on review. See, *e.g. Tileston v. Ullman*, 318 U.S. 44 (1943); *Doremus v. Board of Educ.*, 342 U.S. 429, 434-35 (1952).

II

SINCE THE ORDINANCE DOES NOT INVOLVE A SUSPECT CLASSIFICATION AND DOES BEAR A RATIONAL RELATIONSHIP TO A LEGITIMATE MUNICIPAL INTEREST, IT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

By limiting its application to land which has not yet been zoned for residential use, the ordinance does discriminate between owners of such land and owners of land which has already been so zoned. However, the mere showing of some discrimination is not sufficient to prove an invasion of one's constitutional rights. Absent a suspect classification or invasion of fundamental rights, equal protection rights are violated only where the classification does not bear a rational relationship to a legitimate governmental interest. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974); *City of Peta-*

luma, supra, at p: 11; *Ybarra v. City of Town of Los Altos Hills,* 503 F. 2d 250, 254 (9th Cir. 1974).

The stated purpose of the ordinance is the relief of overcrowded schools, and even appellant does not claim that this is not a legitimate purpose. It does contend, however, that despite the stated purpose of the ordinance, its real purpose is "to secure lower tax rates for its present residents at the expense of both its future residents and of citizens of the other parts of the Bay Area." (JS 14). This contention is contrary to the express finding of the Trial Court that the purpose of the ordinance is "to find a solution to the problem of school overcrowding in overcrowded districts, as well as other problems related to rapid residential growth." Finding VI, Findings of Fact and Conclusions of Law, p. 4. In any case, any contention that the ordinance is designed to discriminate against persons of certain races or income levels ignores the fact that it specifically requires a study of "how further residential development can be required to include an equitable proportion of housing for all income levels." Section 2(d), at JS 7. See also *City of Petaluma, supra,* at pp. 12-16. Finally, as appellant concedes (JS 21), the contention that the ordinance involves an unconstitutional taking runs contrary to *Jordan v. Village of Menomonee Falls,* 28 Wis. 2d 608, 137 N.W. 2d 442 (1965), *appeal dismissed,* 385 U.S. 4 (1966). See also fn. 7 of the lower Court's opinion (JS 12).

The classifications created by the ordinance are also rationally related to its purpose. It does not discriminate between old and new residents per se, but between land which is zoned residential and land which is not. It is certainly reasonable (and in some cases constitutionally required) to exempt from the requirements of a new ordinance parties who have made substantial investments that would be negatively affected by the ordinance, and as pointed out by the California Supreme Court (JS 11-12), there is nothing irrational in making such a distinction between those who have already obtained residential zoning and those who can only "hope" to obtain such zoning. Moreover, since the State of California has been held to have preempted certain areas of law regarding land that has already been zoned (*e.g.* subdivision regulations), it was not only rational but necessary that the subject ordinance be limited to restrictions on zoning, which California courts have held are still entirely within the control of charter cities. Drawing a line anywhere involves some anomalies, but the present ordinance falls well within the "rational relationship" test. See *Village of Belle Terre, supra,* at 8.

III

SINCE THE ORDINANCE IS A GENERAL LEGISLATIVE ACT, PROCEDURAL DUE PROCESS DID NOT REQUIRE THAT NOTICE AND HEARING BE GIVEN TO EVERY AFFECTED PROPERTY OWNER.

There is no constitutional requirement for notice or hearing in a legislative proceeding. *Bi-Metallic Co. v. Colorado,* 239 U.S. 441, 445 (1951). The present ordinance falls clearly within the class of such general legislation, establishing a "broad, generally applicable rule of conduct on the basis of a general public policy."

Opinion of California Supreme Court, quoted at JS, App. D at 27.

The *Bi-Metallic* case makes it clear that if the San Jose City Council had adopted the subject ordinance, notice and hearing to property owners would not have been required. Appellant, however, contends that enactment of the same ordinance by initiative violates due process because it "subjects the property rights of every individual to the mercy and whim, selfish or otherwise, of the majority. . . ." JS in *San Diego Building Contractors Association v. City Council of the City of San Diego*, Docket No. 74-1459 (hereinafter cited as *San Diego* JS), p. 7.

In support of this contention, appellant cites *Eubank v. City of Richmond*, 226 U.S. 137 (1921), and *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928). However, these cases involve the validity of attempted delegation of legislative authority to neighborhood groups, and therefore have no application to the right to legislate by initiative, which the California Constitution expressly reserves to the people. See cases cited in the California Supreme Court Opinion, JS App. C, at p. 10. Moreover, the type of "neighborhood reference" called for in Section 4 of the ordinance has been expressly upheld in *Cusack Co. v. Chicago*, 242 U.S. 526, 530-531 (1917) (distinguishing *Eubank*).

Appellant also claims that the California decision conflicts with decisions of many other state courts. As pointed out in the opinion itself, however, most of these decisions were based specifically on an applicable statute, with discussion of constitutional requirements being pure dictum. See fn. 6 of the *San Diego* decision,

JS App. D, at p. 33. In cases where the issue was squarely presented, other state courts have reached the same conclusion as California. See *Drockton v. Board of Elections of Cuyahoga County*, 16 Ohio Misc. 211, 240 N.E. 2d 896, 900 (1968).

Finally, appellant relies on a number of decisions of this Court declaring that the root requirement of the due process clause is that an individual be given an opportunity for a hearing before he is deprived of any significant property interest. (*San Diego* JS, 17-20). As pointed out by the California Supreme Court, however, these cases all involve adjudicative determinations, which this Court has always distinguished from general legislation. JS, App. D at pp. 25-27.

CONCLUSION

While this case does deal with important issues, they are all matters which have been clearly resolved in past decisions of this Court. For this reason, the appeal should be dismissed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

JANICE SOUZA, being first duly sworn, under oath, deposes and says:

1. That on the 22nd day of September, 1975, three copies of the Motion to Dismiss Appeal, were mailed, postage prepaid, to:

HONORABLE EDWARD BRADY,
Judge of the Superior Court
191 North First Street,
San Jose, Calif. 95113

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2. That all parties required to be served have been served.

Subscribed and sworn to before me this 22nd day of September, 1975 at San Jose, California.

JANICE SOUZA

Subscribed and sworn to before me this 22nd day of September, 1975, at San Jose, California.

NOTARY PUBLIC